

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

In Re:

APPLICATION OF SBA TOWERS II, LLC ("SBA") FOR A
CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY
AND PUBLIC NEED FOR THE CONSTRUCTION,
MAINTENANCE AND OPERATION OF A
TELECOMMUNICATIONS FACILITY AT ONE OF TWO
ALTERNATE SITES AT RABBIT HILL ROAD IN
WARREN, CONNECTICUT

DOCKET: 378

June 9, 2009

**MOTION BY CONCERNED RESIDENTS OF WARREN AND
WASHINGTON TO RECONSIDER PROHIBITION OF DIRECT
AND REDIRECT EXAMINATION OF PARTY WITNESSES**

Concerned Residents of Warren and Washington [CROWW], party in the above captioned proceeding, hereby moves the Council to reconsider the ruling by the Council Chairman during the pendency of the hearing on this proceeding on June 2, 2009 prohibiting all direct and redirect examination of party witnesses.

The Siting Council's regulations provide:

Sec. 16-50j-25. General provisions

(a) **Purpose of hearing.** The purpose of the hearing in a contested case shall be to provide to all parties an opportunity to present evidence and cross-examine all issues to be considered by the council and to provide intervenors an opportunity to present evidence and cross-examine such issues as the council permits.

(Emphasis added.)

The Administrative Procedure Act provides:

Sec. 4-178. Contested cases. Evidence. In contested cases: (1) Any oral or documentary evidence may be received, but the agency shall, as a matter of policy, provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence; (2) agencies shall give effect to the rules of privilege recognized by law; (3) when a hearing will be expedited and the interests of the parties will not

be prejudiced substantially, any part of the evidence may be received in written form; (4) documentary evidence may be received in the form of copies or excerpts, if the original is not readily available, and upon request, parties and the agency conducting the proceeding shall be given an opportunity to compare the copy with the original; (5) a party and such agency may conduct cross-examinations required for a full and true disclosure of the facts; (6) notice may be taken of judicially cognizable facts and of generally recognized technical or scientific facts within the agency's specialized knowledge; (7) parties shall be notified in a timely manner of any material noticed, including any agency memoranda or data, and they shall be afforded an opportunity to contest the material so noticed; and (8) the agency's experience, technical competence, and specialized knowledge may be used in the evaluation of the evidence.
(Emphasis added.)

The Issue of Public Expense

In a memorandum of April 20, 2009 announcing the pre-hearing conference on this docket, the Council declared that "[t]o save the time and expense of the public, the Council wishes to avoid direct testimony at the hearing."

As the Council is well aware, the public pays none of the Council's expenses, as all Council funds are derived from fees and assessments from the industry that appears before it. Limiting direct testimony does not save the public any expense.

While such avoidance of "direct testimony at the hearing" may be a Council "wish" for its own convenience and expediency, it violates fundamental due process and equal protection principles that apply to all administrative proceedings:

If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here, a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal. Pittsburgh

&c. Railway Co. v. Backus, 154 U. S. 421, 154 U. S. 426; Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 164 U. S. 171 et seq.

Londoner v. Denver, 210 U.S. 373, 386 (1908)

Due process, incorporating an opportunity to be heard, is based on the premise that there should be no unfair or mistaken deprivation of property rights, a fundamental consideration in Docket 378 for the citizens and municipal and state parties and intervenors who have taken great pains and incurred considerable expense to prepare and appear before the Council:

Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test.

[D]ue process is afforded only by the kinds of "notice" and "hearing" that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property. . .

Sniadach v. Family Finance Corp., supra, at 343 (Harlan, J., concurring). See Bell v. Burson, supra, at 540; Goldberg v. Kelly, supra, at 267.

Fuentes v. Shevin, 407 U.S. 67, 96 (1972)

The Council's own guidelines establish an affirmative right to fully present and develop facts on the record. Conn. Gen. Stat. section 16-50o(a) provides a distinct and affirmative right to present oral evidence "required for a full and true disclosure of the facts":

Sec. 16-50o. Record of hearing. Rights of parties. * * *(a) A record shall be made of the hearing and of all testimony taken and the cross-examinations thereon. Every party or group of parties as provided in section 16-50n shall have

the right to present such oral or documentary evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

Cross-examination necessarily must include the right of re-direct examination to clarify incomplete witness answers during cross.

Under the Connecticut and Federal Constitutions, and under statutory mandates guiding this Council, Party CROWW has the express and affirmative right to present full and complete oral testimony necessary to truly and fully present the facts on which this Council must render its decision.

CONCLUSION

Based on the foregoing Constitutional due process rights, Concerned Residents of Warren and Washington request that the Council reconsider the prohibition of direct oral testimony and re-direct examination of its witnesses to insure a full and fair hearing on the merits of the issues in this proceeding.

Respectfully submitted,

_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on this day, an original and fifteen copies of the foregoing Motion of Concerned Residents of Warren and Washington to Reconsider Prohibition of Direct and Redirect Examination of Party Witnesses was served on the Connecticut Siting Council by first class mail and copy of same was sent postage prepaid to:

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